(3)

No. 99-719

Supreme Court, U.S.
FILED
DEC 2[illegible] 1999

In the Supreme Court of the United States

RICHARD A. FREDERICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

LORETTA C. ARGRETT
Assistant Attorney General

FRANK P. CIHLAR
ANNETTE M. WIETECHA
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

14 pp

QUESTION PRESENTED

Whether accounting worksheets and related information prepared for tax returns and tax audits are protected from disclosure pursuant to an Internal Revenue Service summons by either the attorney-client privilege or the work-product doctrine.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Binks Mf. Co. v. *National Presto Indus., Inc.*, 709 F.2d 1109 (7th Cir. 1983)	8
Canaday v. *United States*, 354 F.2d 849 (8th Cir. 1966)	5
Colton v. *United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963)	6, 7
Couch v. *United States*, 409 U.S. 322 (1973)	5, 9
Fisher v. *United States*, 425 U.S. 391 (1976)	4
Grand Jury Investigation, In re, 842 F.2d 1223 (11th Cir. 1987)	5
Hickman v. *Taylor*, 329 U.S. 495 (1947)	4
Rogers v. *Lodge*, 458 U.S. 613 (1982)	10
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	10
United States v. *Abrahams*, 905 F.2d 1276 (9th Cir. 1990)	6, 7, 9
United States v. *Adlman*, 134 F.3d 1194 (2d Cir. 1998)	6, 7
United States v. *Arthur Young & Co.*, 465 U.S. 805 (1984)	5
United States v. *Bisceglia*, 420 U.S. 141 (1974)	4-5
United States v. *Bornstein*, 977 F.2d 112 (4th Cir. 1992)	5

Cases—Continued: Page

United States v. *Davis*, 636 F.2d 1028 (5th Cir.), cert. denied, 454 U.S. 862 (1981) 5
United States v. *El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984) 8
United States v. *Euge*, 444 U.S. 707 (1980) 4
United States v. *Gurtner*, 474 F.2d 297 (9th Cir. 1973) 5
United States v. *Laurins*, 857 F.2d 529 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989) 9-10
United States v. *Lawless*, 709 F.2d 485 (7th Cir. 1983) 5, 9
United States v. *Nobles*, 422 U.S. 225 (1975) 4
Upjohn v. *United States*, 449 U.S. 383 (1981) 4
Williams v. *Commissioner*, 1 F.3d 502 (7th Cir. 1993) 9

In the Supreme Court of the United States

No. 99-719

RICHARD A. FREDERICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 182 F.3d 496. The opinions of the district court (Pet. App. 16a-38a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1999, and amended on May 18, 1999. A petition for rehearing was denied on July 26, 1999 (Pet. App. 39a-40a). The petition for a writ of certiorari was filed on October 25, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Richard Frederick is an attorney. He prepared the tax returns filed by petitioners Randolph and Karin Lenz and their company, KCS Industries, Inc. (Pet. App. 2a). In connection with an investigation of the Lenzes and their company, the Internal Revenue Service issued summonses to Frederick directing him to produce various documents—including tax forms and worksheets—relating to the preparation of these tax returns (*ibid.*). Although Frederick substantially complied with the summonses, he claimed that approximately 800 pages of documents were protected by the attorney-client privilege, the work-product doctrine, or both (*id.* at 17a). When the United States brought this suit to enforce the summonses, the Lenzes and their company intervened (*id.* at 2a, 33a).

2. The district court ordered the summonses enforced as to most of the tax forms and worksheets which it found contained "information reported to an accountant but not confidential communication between a client and attorney" (Pet. App. 36a). Noting that "potential inferences of confidential communication are not enough to warrant the privilege," the court held that petitioners failed to produce any evidence to establish that the documents in fact represented privileged communications (*id.* at 36a-37a). The court concluded that the work-product doctrine was also inapplicable to these documents, which reflected "accounting calculations but not legal theories" (*id.* at 37a). The court held that "draft returns and worksheets that do not contain written notations are not protected by the work product doctrine" (*ibid.*).

The court then conducted an *in camera* review of the remaining documents such as handwritten notes,

letters, facsimiles, memoranda, redacted documents and other draft returns (Pet. App. 34a, 38a). The court found that 16 of these documents were privileged as confidential attorney-client communications or attorney work-product (*id.* at 27a-28a). The court concluded that the remainder of the documents were not privileged. Some were not privileged because they were of a type that would be created by an accountant for preparation of the tax returns (*id.* at 20a-21a). With respect to some documents, the attorney-client privilege had been waived (*id.* at 22a). And, with respect to several documents, petitioners had not offered evidence to fulfill their burden of proof to sustain a privilege (*id.* at 23a-25a).

3. The court of appeals affirmed (Pet. App. 1a-15a). The court stated that the clearly erroneous standard of review applies to the mixed question of fact and law involved in determining "[w]hether a particular document is privileged" (Pet. App. 3a), and the court found no clear error in the findings of the district court.

The court observed that some of the contested documents were created both for use in preparing tax returns and for use in litigation (Pet. App. 4a-6a). The court held that this sort of "dual purpose" document must be disclosed because, "otherwise, people in or contemplating litigation would be able to invoke, in effect, an accountant's privilege, provided that they used their lawyer to fill out their tax returns" (*id.* at 8a).

The court similarly held that documents created in connection with audits of petitioners' tax returns were not protected by the work-product doctrine (Pet. App. 9a). The court noted that "an audit is both a stage in the determination of tax liability * * * and a possible antechamber to litigation" (*ibid.*). The court stated that the work-product doctrine may not be invoked to pro-

tect information prepared by an accountant to complete or "verify[] the accuracy of a return" because "this is accountants' work and it remains such even if the person rendering the assistance is a lawyer rather than an accountant" (*ibid.*). Although the privilege unquestionably applies when "the lawyer is doing lawyer's work," none of the contested documents related to that type of representation (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. As this Court has noted, summonses are "subject to the traditional privileges and limitations." *United States* v. *Euge*, 444 U.S. 707, 714 (1980). See also *Upjohn* v. *United States*, 449 U.S. 383, 397 (1981). The attorney-client privilege and the work-product doctrine may therefore be invoked in summons enforcement proceedings. These evidentiary privileges, however, are limited by their very nature. The attorney-client privilege "has the effect of withholding relevant information from the factfinder, [and] it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). The work-product doctrine similarly applies only to the extent that it is necessary to protect documents prepared in anticipation of litigation. See *United States* v. *Nobles*, 422 U.S. 225, 238 (1975); *Hickman* v. *Taylor*, 329 U.S. 495, 510-511 (1947).

Apart from these traditional privileges, other restrictions on the summons power do not exist "absent

unambiguous directions from Congress." *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1974). In particular, "no confidential accountant-client privilege exists under federal law, and no state-created [accountant-client] privilege has been recognized in federal cases." *Couch* v. *United States*, 409 U.S. 322, 335 (1973). See also *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 817-819 (1984).

b. Petitioners err in contending (Pet. 8-14) that "dual purpose" accounting documents—created for use both in preparation of a tax return and in assisting the attorney in giving legal advice—are protected by the attorney-client privilege or the work-product doctrine. Information intended "for use in connection with the preparation of tax returns" constitutes "an unprivileged category of numbers" (Pet. App. 8a). The performance of such tax return calculations, while requiring some understanding of tax law, is an accounting exercise that does not constitute a privileged communication. See *United States* v. *Davis*, 636 F.2d 1028, 1043 & fn. 17 (5th Cir.), cert. denied, 454 U.S. 862 (1981); *United States* v. *Gurtner*, 474 F.2d 297, 299 (9th Cir. 1973); *Canaday* v. *United States*, 354 F.2d 849, 857 (8th Cir. 1966). Non-privileged communications do not become privileged merely because they are made to or by an attorney. As the courts have consistently held in rejecting petitioners' claim, if a taxpayer who uses an attorney to perform an accounting service were allowed to shield his communications in this manner, the result would be to create an improper "accountant-client" privilege that would be available only to attorneys. *United States* v. *Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *United States* v. *Bornstein*, 977 F.2d 112, 116-117 (4th Cir. 1992); *In re Grand Jury Investigation*, 842 F.2d 1223, 1224-1225 (11th Cir. 1987).

For these same reasons, documents prepared in connection with tax return preparation are not encompassed within the work-product doctrine. Such documents represent accountant's work-product, not attorney's work-product, even if some legal analysis is inescapably reflected in the financial calculations. As the court of appeals stated, "the documents in issue do not, so far as we are able to determine, relate to [legal] representation" (Pet. App. 9a). That factual determination is not clearly erroneous and does not warrant further review.

c. Petitioners err in contending (Pet. 10-14) that the decision in this case conflicts with the decisions in *United States* v. *Adlman*, 134 F.3d 1194 (2d Cir. 1998), *United States* v. *Abrahams*, 905 F.2d 1276, 1284 (9th Cir. 1990), and *Colton* v. *United States*, 306 F.2d 633, 637 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963). Those decisions are consistent with the decision of the court of appeals in this case.

In *Adlman*, the court of appeals held that the work-product doctrine may be invoked only with respect to documents that "were prepared 'because of' existing or expected litigation." 134 F.3d at 1198. The court remanded in that case for the district court to determine whether the contested document "would have been prepared irrespective of the expected litigation with the IRS." *Id.* at 1204. In the present case, by contrast, the court of appeals correctly concluded that the draft returns and worksheets were intended "for use in connection with the preparation of tax returns" (Pet. App. 8a) and would thus have been prepared irrespective of any expected or subsequent litigation (*id.* at 8a-9a). The fact that these documents were prepared for this additional, *independent* purpose is what makes them "dual purpose" documents and explains

why they are not protected by any privilege. See *United States* v. *Adlman*, 134 F.3d at 1204 (the privilege is inapplicable if "substantially the same" document would have been prepared for the non-privileged purpose).

Petitioners incorrectly assert that the Ninth Circuit broadly ruled in *United States* v. *Abrahams*, 905 F.2d at 1284, that all communications between a taxpayer and an attorney who prepares a tax return are privileged. Instead, the court held in *Abrahams* only that a taxpayer may attempt to establish that the information disclosed to his lawyer was, in fact, made for the purpose of obtaining legal advice rather than preparing the return. *Ibid.* In the present case, as in *Abrahams*, the taxpayers were given that opportunity but failed to meet their burden of proof. Pet. App. 7a-9a; see 905 F.2d at 1284. As the court stated in *Abrahams*, the burden of establishing the existence of the privilege rests on the taxpayer and there is no "presumptive application of the attorney-client privilege in these circumstances." *Id.* at 1283.

Nor does *Colton* v. *United States*, 306 F.2d at 640, support petitioners' broad proposition. In that case, the court of appeals held that an attorney cannot invoke the work-product doctrine unless the "papers involved were collected or prepared in anticipation of litigation." *Ibid.* In *Colton*, the court rejected the same "blanket" assertion made by petitioners in this case that every communication between a taxpayer and an attorney who prepares the taxpayer's return is privileged. *Ibid.*

2. a. Contrary to petitioners' contention (Pet. 15-20), the court of appeals correctly held that the work-product doctrine does not apply to documents, numerical and otherwise, prepared in connection with audits of petitioners' tax returns. Documents that address tax

planning or audit issues or that relate to the characterization of a taxpayer's finances for tax reporting purposes are not created because of the prospect of litigation. The mere possibility of future litigation stemming from a tax return or tax audit is not sufficient to invoke the work-product doctrine. *Binks Mfg. Co.* v. *National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983). Instead, the "motivating purpose behind the creation of a document * * * must be to aid in possible future litigation." *Ibid.* Petitioners failed to establish that the contested documents were created because of the prospect of litigation rather than to facilitate or ensure compliance with their tax reporting obligations. Pet. App. 9a. See also *United States* v. *El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984). Because petitioners failed to meet their required burden of establishing that the documents related to legal representation rather than tax return preparation, the court of appeals correctly denied petitioners' claim of work-product protection.

b. The court of appeals also correctly held that petitioners failed to establish that documents created in connection with audits of their tax returns were protected by the attorney-client privilege. As the court stated, "[w]hen a revenue agent is merely verifying the accuracy of a return, often with the assistance of the taxpayer's accountant, this is accountants' work and it remains such even if the person rendering the assistance is a lawyer rather than an accountant. Throwing the cloak of privilege over this type of audit-related work of the taxpayer's representative would create an accountant's privilege usable only by lawyers." Pet. App. 9a. The court explained that, although the attorney-client privilege may attach to documents created in connection with a lawyer's interpretation of

statutory or case law, documents prepared in connection with an agent's verification of the accuracy of a return are not privileged because "this is accountants' work and it remains such even if the person rendering the assistance is a lawyer rather than an accountant." *Ibid.*

This holding is consistent with the established principle that the attorney-client privilege protects only communications made in confidence by the client in the course of seeking legal advice from a lawyer acting as a lawyer. See *United States* v. *Lawless*, 709 F.2d at 487. There is no "accountant-client" privilege. *Couch* v. *United States*, 409 U.S. at 335. Petitioners failed to demonstrate that the contested documents were created by Frederick while he was providing services other than accounting services.

3. Finally, petitioners err in asserting (Pet. 20-22) that the court of appeals applied an incorrect standard of review. According to petitioners, the court of appeals should have applied a *de novo* standard of review in applying the law to the facts of this case (Pet. 22). The question whether the contested documents are privileged, however, is primarily a factual one. As the court stated, "[w]hether a particular document is privileged is a fact-specific and case-specific issue." Pet. App. 3a. The proper application of an evidentiary privilege does not readily lend itself to the formulation of a general rule; instead, it "requires a judgment based on the idiosyncratic facts of a particular case." *Williams* v. *Commissioner*, 1 F.3d 502, 505 (7th Cir. 1993). As the court stated in *United States* v. *Abrahams*, 905 F.2d at 1282 "rulings on essentially factual matters underlying claims of privilege are reviewable for clear error." See also *United States* v. *Laurins*, 857 F.2d 529, 541 (9th Cir. 1988), ("rulings on the scope of

the privilege involve mixed questions of law and fact and are reviewable *de novo*, unless the scope of the privilege is clear and the decision made by the district court is essentially factual; in that case only clear error justifies reversal"), cert. denied, 492 U.S. 906 (1989). Further review of such findings "concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)) is, in any event, not warranted. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

FRANK P. CIHLAR
ANNETTE M. WIETECHA
Attorneys

DECEMBER 1999